IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5819 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SHAH DIMPLE JAYENDRAKUMAR

Versus

STATE OF GUJARAT

Appearance:

MR BHASKAR TANNA, Sr. Counsel with MR DC DAVE for Petitioners

MR PG DESAI, LD. GP. for Respondent No. 1 & 2

MR HAROOBHAI MEHTA, Ld. Sr. Counsel as Intervener

MR DA BAMBHANIA For Respondent No.4

MR AH MEHTA with MR KV SHELAT for respondent no.5

NOTICE SERVED to Respondent No.3.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 08/09/98

JUDGEMENT

Rule. Service of rule waived by the Mr. P.G. Desai, Ld. G.P. for the respodnent-State and the learned advocates appearing for other respondents.

2. In the interest of the students at large this petition is taken up for final disposal at the admission stage. Even the learned advocates and the Ld. G.P. appearing for the parties as well as Mr. Haroobhai Mehta, learned senior counsel, who has been permitted to intervene, have argued the matter at length. Having heard them I now proceed to dictate this judgment.

3. In this petition under Article 226 read with Articles 14, 21, 15(4) and 16(4) of the Constitution of India the petitioners have prayed for following reliefs :-

"(A) That this Hon'ble Court be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction commanding the respondents to implement the provisions embodied in Rule 6 of the said Rules, which, inter-alia, figure at Exh. 'B' to the petition;

(B) That this Hon'ble Court be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction commanding to the State of Gujarat not to implement reservation to the extent of 27% in favour of S.E.B.C. and thereupon, to confine the same to the extent of 10% to the total available seats in respect of various disciplines without creating additional seats in the form of supernumerary seats in respect of various disciplines to the extent of 17%,as assured vide the Government Resolution of the date 23rd February, 1994, appearing at Exh. 'E' to the petition;

(C) That this Hon'ble Court be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction commanding to the respondents to exclude seats reserved for NRI quota at Pramukh Swami Medical College, Karamsad while computing seats to be reserved for various categories referred to in Rule 2 of the said Rules at Exh 'B' to the petition and, thereupon be pleased to declare the portion of the said Rule 2 of the said Rules, which speaks about

inclusion of seats reserved for NRI quota while computing total seats to be reserved for reserved category at Pramukh Swami Medical College, Karamsad;

(D) That this Hon'ble Court be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction commanding to the State of Gujarat to comply with the provisions embodied in Rule 2.5 of the said Rules at Exh. 'B' to the petition stricto sensu without earmarking seats, which are not filled in from S.T. category for Nomadic Tribe and Denotified Tribe and, thereupon, be pleased to declare the Government Resolution dated 29th May, 1998 at Exh. 'H' to the petition as null and void;

(E) That this Hon'ble Court be pleased to issue a writ of mandamus and/or any other appropriate writ, order or direction commanding to the State of Gujarat to implement the relevant rules in the discipline of of Engineering and Pharmacy, which are pari materia to the Rules referred to hereinabove as per the directions imparted by this Hon'ble Court with reference to the said Rules at Exh. 'B' to the petition;

The petitioners have claimed for interim relief to implement Rule 6 and in the alternative to command to the respondents to follow the formula evolved by this Court vide its order dated 31/8/1995.

4. At the out set it might be noted that all the aforesaid reliefs revolve round Rule 6 concerning reservation of 27% seats for admission to 1st M.B.B.S., 1st B.D.S. Course and 1st Physio Pherapy course at the Government medical college, P.S. Medical College, Government Dental Colleges, school of Physio Therapy in the Gujarat State. It would, therefore, be appropriate to reproduce Rule 6 as it stood before what transpired before this Court in respect of the said rule :

'6. The difference between the marks obtained by the socially and educationally backward classes students including widows/orphan children seeking admission against reserved seats and those obtained by students seeking admission by the open merit list should not be more than 5% at each college. Only those marks which are considered for determining merit order of the candidate will be considered for determining under the rule."

The aforesaid rule which stood as approved vide G.R. No. (MCG/1097/4234/J/ Dt.25-5-1998) would also consist of the following note below the rule and the same also might be reproduced since as can be seen hereafter, part of the reliefs would also relate to the note as appended to rule 6 in the aforesaid Rules :

"Note - The admission of candidates of socially and economically backward classes on 27% reserved seats shall be made as per the interim order of Hon. High Court of Gujarat dated 31/7/1996 in SCA No. 5484/96 until disposal of LPA No. 712/95."

5. The second part of the reliefs might be stated as arising from the amendment in the petition. It relates to the Government Notification dated 10/7/1998 concerning the aforesaid rules for the year 1998-99. It refers to Government Resolution, Health and Family Welfare Department No. MCG/1097/4234/J dated 25/5/1998 and the oral order of the Division Bench in L.P.A. No. 712/1995 in S.C.A. No. 5258/1995 dated 20/6/1998. Rule 6 as it stood coupled with the note as stated above, has been deleted while accepting the decision dated 5/8/1995 of this Court (Coram : S.M. Soni, J.) holding Rule 6 as stood originally and without the note as ultra vires and striking down the said rule. Reference has also been made to the disposal of the aforesaid L.P.A. wherein interim arrangement by order dated 31/8/1995 to fill up the seats reserved for S.E.B.C. candidates was arrived at and continued vide the L.P.A. Court's order dated 31/8/1995 till the final disposal of the said L.P.A. It has been recited that the said L.P.A. has been disposed of on 20/6/1998 as having become infructuous. The Government accepted the decision of the learned Single Judge referred to hereinabove and resolved to delete Rule 6 alongwith the note from the Rules for admission to 1st M.B.B.S., 1st B.D.S. course, 1st Bachlor of Physio

-therapy course at Government Medical Colleges, P.S. Medical College, Government Dental Colleges, School of Physio Therapy in the State of Gujarat for the year 1998-99. The last line after para. 2 on page 1 of the aforesaid admission rules "Please see note below Rule 6 on page 3" is also deleted by the said notification. Thus, second part of the relief seeks to continue the aforesaid Rule 6 coupled with the note referring to the interim arrangement devised as per the concensus amongst the parties by the Division Bench in the aforesaid Letters Patent Appeal for the current year as the notification should be held not to apply retrospectively and that it should be held to have prospective operation, that any attempt to attribute retrospective operation to the said resolution would have the ultimate effect of rendering the said Government Resolution as unconstitutional in nature, that Rule 6 with the aforesaid note remained in force without any kind of modification till the last date of submission of forms for admission, namely 22/6/1998, that in any case Rule 6 alongwith the note remained in existence when the Rules came to be published for the academic year 1998-99, that the students were specifically and categorically guided by such rule with the note to fill up the forms for admission based upon a clear understanding about the existence of rule alongwith note and with full expectation that the admission forms would be processed accordingly.

KEEPING IN MIND the aforesaid reliefs the submissions made by the learned counsels, and learned Government Pleader might be considered :

I

6. It would not only be appropriate but be just and proper as well as in public interest to deal with the second part of the reliefs quoted hereinabove in the first instance. Not only for that purpose, but also for all purposes reference first will have to be made to what transpired in 1995 when reservation for Socially and Educationally Backward Classes (for short 'S.E.B.C.') to the extent of 27% in place of 10% was introduced. Rule 6 as a consequence of the reservation was introduced in the aforesaid Rules by Government Notification. Rule 6 was then without the note appended thereto. One minor Arpita J. Bamania through her guardian Jitendra Bamania, challenged the said rule under Article 226 of the Constitution of India before this Court in Special Civil Application No. 5258 of 1995. She sought declaration

about the rule to be ultra-vires, arbitrary, illegal, unconstitutional, null and void and prayed for preparing the merit list of the candidates belonging to the reserved category. There was no challenge to any other rule of the Rules except rule 6 in the said petition. The submission before this Court was that when policy of reservation for S.E.B.C. was accepted and 27% seats were reserved, making provision of rule 6 would amount to adding further qualification or dis-qualification in contravention of the reservation for S.E.B.C. so made. In reply it was submitted that there was already report of Baxi Commission appointed by the Government of Gujarat to make recommendations in respect of socially and educationally backward classes and S.E.B.C.s did not have anything in common with the candidates belonging to scheduled castes and scheduled tribes. It was submitted that if rule 6 was held ultra-vires, rule 2 of the aforesaid Rules should also go on the principle of non-severability of the two rules. Reference was made to a decision of the Hon'ble Supreme Court in the case of Indra Sawhney v/s. Union of India reported in AIR 1993 SC 477, popularly known as Mandal case and hereinafter referred to as 'Indra Sawhney's case. Rules 2, 2.4, 2.5, 4, 4.1(a), 4.1(b), 4.1(c) and 6 were quoted for the purpose of appreciating the submissions canvassed on behalf of the rival parties. Observations of the Hon'ble Supreme Court in Indra Sawhney's case (supra) appearing at paras. 87 and 88 were excerpted. Reference was also made to a decision of the Apex Court in the case of State of Andhra Pradesh v/s. U.S.V. Balaram reported in AIR 1972 SC 1375. Paras. 79 and 80 of the said decision were quoted for observing that for the purpose of deciding whether the particular community would fall within the bracket of S.E.B.C., they need not be exactly similar in all respects to that of Scheduled Castes and Scheduled Tribes. Reference was then made to one more decision of the Apex Court in the case of Janki Prasad Parimoo & ors. v/s. State of Jammu and Kashmir & ors. reported in AIR 1973 SC 930 for the purpose of noting the test how to include a particular community in S.E.B.C. For that purpose para. 22 of the decision in that case was reproduced. Reference has then been made to Indra Sawhney's case (supra), which has in turn over-ruled the aforesaid decision in Janki Prasad's case. Reference in that connection was made to para. 121 (3) (a) to (d) of the decision of Indra Sawhney's case (supra). It has been observed that as per the decision in Indra Sawhney's case, it was not necessary for a class to be designated as a backward class and that it was situated similarly to the scheduled castes and scheduled tribes. Therefore, though the candidates of S.E.B.C. are comparable with

scheduled castes and schedules tribes, they were discriminated by providing rule 6, whereby a further dis-qualification was put for admission in the professional course. Reference was made to the report of Baxi Panch at length and once-again reference was made to Indra Sawhney's case (supra) and from the observations quoted from the said decision and while referring to Articles 15(4) and 29(2) of the Constitution of India and dealing with the decision in the case of Miss Rita Kumar v/s. Union of India reported in AIR 1973 SC 1050, it was held that purpose of reservation to bring about real equality stood intercepted by the qualifications contained in rule 6. This Court quoted :

"Vidya Dadhati Vinayam : is learning gives modesty
Vinayat Yati Patradham : is worthiness by modesty

and observed that worthiness would mean capacity to sit with, stand by and equiate with the persons of unreserved category. It has been held that rule 6 cannot be said to be either concession or relaxation or exemption, but was contrary to that and, therefore, instead of enhancing the purpose of reservation for bringing about real equality it would destroy the very purpose of reservation. Observations appearing in para. 111 of the Indra Sawhney's case (supra) were quoted. This Court then proceeded to consider the submissions made in defence that rule 6 was framed in view of the policy of the Government reservation based on the report of Baxi Commission and this Court ought not to interfere with the same. In support of the defence reference was made to decisions in the case of State of Rajasthan v/s. Sevanivatra Karmachari Hitkari Samiti reported in 1995 (1) J.T. 315, Sitaram Sugara v/s. Union of India reported in AIR 1990 SC 1277 and para. 300 of Indra Sawhney's case (supra). This Court once again observed that when rule 6 had not rational with the reservation policy of the State it would appear to be arbitrary, capricious and whimsical as even report of Baxi Commission would not disclose any reason why difference of 5% marks was provided for. Considering the arguments revolving round Article 15(4) of the Constitution of India and dealing with the submissions made in defence, this Court held as under :-

"It may be stated that in view of the fact that high percentage of marks are obtained by the students of the open merit seats and there is likelihood of vast difference of percentage of marks with the students of reserved category, the State to maintain standard of education and raise

merits, may, keeping in mind the present raised standard raise reasonably the percentage of minimum qualifying marks which is 45% for SCs and STs and 55% for all other categories which includes SEBC vide Rule 4.1(a), (b) and (c).

In the result, the petition is allowed.

Rule 6 of the Rules for admission to 1st M.B.B.S./1st B.D.S./1st B.Physio course at the Government Medical Colleges - P.S. Medical College, Karamsad - Govt. Dental Colleges Schools of Physiotherapy in the Gujarat State, 1995-96 is held ultravires Article 14 of the Constitution of India and is declared null and void and is hereby struck down. The respondents are directed not to implement the said Rule 6 for considering admission in 1st M.B.B.S. course. Rule is made absolute with costs."

Relevant propositions find place in the report of the decision contained in 1995 (2) G.L.R. p. 1487.

It appears that Civil Application No. 1636 of 1995 was moved by two of the students from the general category and since learned counsel appearing for the said students was heard as an intervener the said Civil Application was disposed as having become infructuous as per order dated 7/8/1995 when the aforesaid decision was rendered by this Court.

The above decision of the learned Single Judge was taken in Letters Patent Appeal bearing L.P.A. No. 712/1995. Following interim order was passed in Civil Application No. 1868 of 1995 in L.P.A. No. 712/1995 on 31/8/1995 (Coram : B.N. Kirpal, C.J. and R.K. Abichandani, J. - Per B.N. Kirpal, C.J., as His Lordship then was) :-

"We heard the counsel for the parties at length.

We have also heard Mr. Girish Patel, learned counsel appearing on behalf of some of the interveners as well as Mr. Haroobhai Mehta, Senior Standing Counsel for the Union of India. By way of an interim arrangement and the consensus amongst the learned Advocates representing the diverse interests, they invite this Court to pass an order which will have the following effect :

There are 213 SEBC seats on the basis of 27% reservations. out of this, 79 seats will be

filled in from SEBC candidates by invoking Rule 6. 134 seats remain which, as per the judgment of the learned Single Judge, are to be filled in from the SEBC candidates. The consensus amongst the counsel on which the order of the Court is invited, is that 50% seats out of the above 134 seats, namely 67 will be filled in by open merit and the remaining 67 seats (in addition to the above 79 seats) will be filled in by SEBC candidates without applying Rule 6. Shri S.N. Shelat, learned Additional Advocate General appearing for the State Government, states that it will regulate the admission as per the above agreements and direction. Order accordingly.

A similar formula, it is agreed, will be applicable with regard to the seats in the Dental Colleges as well as in the Physiotherapy Colleges and accordingly, as agreed by all the counsel, 26 seats in Dental Colleges will be filed in by SEBC candidates and 11 seats will be filled in by SEBC in Physiotherapy. The aforesaid seats are to be filled in against the reserved seats for SEBC. The quota of S.C./S.T. is no way diluted or disturbed. This arrangement will be applicable for the academic year beginning 1995-96. Appeal and the connected matters are directed to be listed for final hearing after the Diwali vacation."

Then, in Special Civil Application 5484 of 1996 the Division Bench consisting of G.D. Kamat, C.J. and C.K. Thakkar, J. had the occasion of passing following order on 31/7/1996 which finds its place in the note to Rule 6 quoted above :

"We have heard learned counsel for the parties on admission and interim relief. Rule- Mr. Raval, AGP waives service of rule on behalf of the respondents.

It is agreed that by way of interim arrangement, the order made on 31st August, 1995 in Civil Application No. 1868 of 1995 in Letters Patent Appeal No. 712/1995 be made in the present case.

Accordingly, it is open to the respondents to fill up seats in Medical, Dental, Pharmacy and Physiotherapy Colleges in the ratio as follows :-

18.50% for S.E.B.C. and
8.50% for open general category.

However, it is clarified that 10% out of 18.50% shall be by invocation of Rule 6 of the Admission Rules. Needless to say that this arrangement is until disposal of L.P.A. No. 712/1995 and the present Special Civil Application to be heard with L.P.A. No. 712/1995."

It has been submitted that after the disposal of the L.P.A. on 20/6/1998 the Government issued notification dated 10/7/1998 whereas the students passing the H.S.C. examination had filled in the forms on the basis of Rule 6 read with the note as aforesaid. The admission process already stood initiated on the basis of the existing rules. There was therefore, legitimate expectation for the students at large to apply for admissions in the aforesaid medical and allied courses. The notification therefore, could not be validly issued so as to apply retrospectively. In reply, it has been submitted from the relevant dates noted above that, the merit list was not prepared, the admission process was not completed and therefore, the notification could not be said to be not validly issued particularly when the life of interim arrangement reflected in the note to Rule 6 was till the L.P.A. was disposed off.

Now it must be noted with care that the interim arrangement was not only arrived at by general consensus, but the L.P.A. Bench also appeared to have found it to be in the interest of students at large seeking admission in the above courses. The arrangement successfully worked for three consecutive years with peace in both the sections of students. Thus, it could be submitted that public interest attached with its operation concerning students at large who applied for admission on the basis of the arrangement reflected in the note to Rule 6. There has been clearly an adverse effect on their settled rights. Added to this is the disposal of the L.P.A. as having been sought to have become infructuous and not on merits. In my opinion, for all these reasons the principle noted in para. 20 of Kumari Jayshree v/s. State reported in 1979 (20) G.L.R. p. 614 needs to be applied. The applicant in that case filed petition for admission to one of the Government Medical Colleges challenging validity of Rule 5.2(A) added on 1st July, 1978 in the rules for Admission to First M.B.B.S. course. One of the grounds of challenge to the introduction of rule was that it was introduced after the

last date for filing applications for admission had expired and therefore, it could not have been validly enacted more so because it altered the position in such a manner as it affected and altered settled rights by retrospective operation. In that respect this Court observed as under :-

> "..... Now, it might be clarified at the outset that though the State Government has every right to frame rules regulating admission to Government Colleges based on certain rational policy and to amend them, if occasion arises, to remove any defect or lacuna, it would be always desirable to formulate and finalise such rules with precision well in advance and to make the rules relating to admission known to the intending applicants at a point of time reasonably anterior to the last date of admission. In a society governed by the rule of law, certain basic principles must be observed. One of such principles is that enactments or orders governing public rights and duties must be open and adequately published and that they should be relatively stable. If such an enactment or order is to guide the people, they must be able to find out what it is and it should not be changed too often. An ambiguous, vague, obscure or imprecise enactment or order is likely to misguide or confuse those who are to be guided by it and too frequent changes would make it well-nigh difficult, if not impossible, for the people to make long term planning and decisions (see Joseph Raz on "The Rule of Law and its Virtue", The Law Quarterly Review, Vol. 93, page 195). Indeed, F.A. Hayek's definition of the rule of law is :
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> > "..... this means that Government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its powers in given circumstances and to plan one's individual affairs on the basis of this knowledge" (See "The Road to Serfdom." p.54).
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> In this connection, it would be worthwhile to recall the observations made by the Supreme Court in Jaisinghani v. Union of India, AIR 1967 S.C.

1427 at page 1431. It was there pointed out that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler. Where discretion is absolute, man has always suffered. It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful. It would appear from the above observations that predictability even of the administrative decision is one of the essentials of rule of law which is the high policy of the Constitution embodied in Article 14. This principle would govern the framing of Rules for admission to the Government Medical Colleges because those institution are run out of public funds and the Government in framing its policy in regard to the admission to those Colleges must act with some predictability. ...."

The objection is in respect of sudden introduction of the G.R. dated 10/7/1998 for deletion of Rule 6 coupled with the note as referred to hereinabove. It is not the case of the Government that while getting the aforesaid L.P.A. disposed of as having become infructuous the question with regard to continuation of the interim arrangement in the current year was either submitted before the L.P.A. Bench or whether there was any opportunity to one section of the students to make submissions with regard to continuation of the interim arrangement for the current year at the point of time when the admissions process had already begun, but had not completed as stated above. In that view of the matter in the interest of fair play and justice also the

interim arrangement as reflected by note as aforesaid needs be continued for the current year while holding and directing the Government for application of the Government Resolution/Notification dated 10/7/1998 with prospective effect from the ensuing academic year in the year 1999.

II

It was submitted on behalf of the petitioners that in case second part of the relief would be accepted, the questions covered by the first part of the relief in note need not be decided as they turn out to be academic in nature. In reply, Mr. Haroobhai Mehta pointed out to this Court that struggle of the backward classes for achievement of parity is and will be thwarted by not deciding the matter and leaving it half way keeping open the questions to be adjudicated at a later point of time. Mr. Mehta referred to the observations of learned author Marc Galanter in the book titled 'Competing Equalities' (Law and the Backward Classes in India) (Oxford University Press, 1984) as contained in Chapter 14 'the Setting and Incidence of Judicial Intervention'; the observations read :-

"Summing up, we may surmise that the gross effect of litigation on the compensatory discrimination policy has been to curtail and confine it. Those who have attacked compensatory discrimination schemes in court have complied a remarkable record of success, while those seeking to extend compensatory discrimination have been less successful."

Mr. Mehta then made reference to the decisions of the Apex Court in the case of A.B.S.K. Sangh (Rly) V/s. Union of India reported in AIR 1981 SC 298 (3) and The Comptroller and Auditor General of India v/s. K.S. Jagannathan and anr. reported in AIR 1987 SC 537. Mr. Mehta drew the attention of this Court to para. 98 of A.B.S.K. Sangh's case and para. 21 of the Comptroller and Auditor General's case (supra). Mr. Mehta also drew the attention of this Court to what has been said in first 3 paras. of Indra Sawhney's case (supra).

In my opinion, the fair play and justice as spoken to while dealing with second part of the reliefs would also need adjudication of the first part of the reliefs so that the litigation on the subject may not become endless; even on the principle of predictability referred to in I above, would need adjudication of the

first part of the reliefs.

Mr. Bhaskar Tanna, learned counsel appearing for the petitioners firstly submitted that the decision of the learned Single Judge in S.C.A. No. 5258 of 1995 related to the challenge on Rule 6 as reproduced hereinabove and that decision does not deal with challenge to the very 27% of the reservation for the SEBC in place of earlier reservation of 10% for OBCs. According to his submission Indra Sawhney's case (supra) was on the subject of services and it did not deal with education. According to his submission the reservation for SEBC as aforesaid would tantamount to extending undue favour to a particular class of non-meritorious students. Even if it is found that there was no challenge to reservation to the extent of 27% for SEBC in place of 10% for OBC before the learned Single Judge and even if it is found that such a challenge is out of place in view of Indra Sawhney's case (supra), the decision of the learned Single Judge would operate in personam and it would be open to the petitioners to present their challenge against the increase of reservation by 17% in favour of SEBC. He submitted that in so far as the Government of Gujarat is concerned, there was no scientific data available making reservation of 27% for SEBC class. In his submission there is an obvious difference between the operation of Article 15(4) and Article 16(4) of the Constitution of India. According to his submission, reverse discrimination would result in the field of consideration of merits in case reservation in favour of SEBC to the extent of 27% is allowed to be operated.

In reply, Mr. P.G. Desai, Ld. G.P. submitted that on going through the petition it would clearly appear that although there are passing references with regard to 27% reservation in favour of SEBC the reliefs in substance revolve round existence or non-existence of the Rule 6 either with or without the note appended thereto. His submission is that the policy decision of the Government of making reservation of 27% in favour of SEBC in the field of education is justified in view of the report of Mandal Commission as having been accepted in Indra Sawhney's case (supra). For the purpose of scientific data for making reservation to the extent of 27% for SEBC Mr. P.G. Desai as well as Mr. Haroobhai Mehta referred to the report of Mandal Commission as well as to Indra Sawhney's case (supra). Both of them further submitted that there is no substance in the submissions made by Mr. Tanna, learned counsel for the petitioners. In respect of the reverse discrimination in the field of consideration of merits they relied upon a decision of

the Apex Court in the case of P.G.I. of Medical Education & Research v/s. K.L. Narasimhan reported in 1997 (6) SCC 283.

At the outset, it may be stated that I have no reason to take a view different from that of the learned Single Judge in Special Civil Application No. 5258 of 1995 particularly when the Apex Court has observed as under in P.G.I. of Medical Education & Research's case (supra) in para. 25 at page 308 :-

"As stated earlier, the benefit of reservation does not necessarily imply downgrading the excellence. Every student after admission into the postgraduate speciality or superspeciality is required to undergo the same course of study, same standard and higher performance for qualifying the courses for conferment of the degrees in the respective specialities or superspeciality or technical subjects. In that regard, there is no relaxation given to the candidates belonging to reserved categories. A student who would pass postgraduation on a par with the general candidates is also expected to have the same degree of excellence on a par with general candidate, with a lesser benefit of marks only for admission into the course of study by relaxing the same standard of marks. Securing marks is not the sure proof of higher proficiency, efficiency or excellence. These are matter of acquired ability by studious application of mind, skills in performance by the candidate concerned, be it general candidate or reserved candidate. It is a matter of application of the mind, constant assiduity to improve skills, capabilities and capacities and excellence in the subject or the field of action chosen by the candidate. In that behalf, it is common knowledge that marks would be secured in diverse modes. It is no indicia that particular percentage of the marks secured is an index of the proficiency, efficiency and excellence. They are awarded in internal examinations on the basis of caste, creed, colour, religion, etc. It is the constitutional imperative of the executive to provide opportunities and facilities to the handicapped to acquire the degree in specialities, superspecialities or technical posts. Denial thereof, is a total denial of right to enjoy equality. It is well-settled legal position that fundamental rights are to be

interpreted broadly to enable the citizens to enjoy the rights enshrined in Parts III and IV of the Constitution."

While dealing with the earlier decisions in Jagadish Saran (Dr.) v/s. Union of India reported in (1980) 2 SCC 768, Pradeep Jain (Dr.) v/s. Union of India reported in (1984) 3 SCC 654, Indra Sawhney's case, Ajay Kumar Singh v/s. State of Bihar reported in (1994) 4 SCC 401, Ahmedabad St. Xavier's College Society v/s. State of Gujarat reported in (1974) 1 SCC 717, Marri Chandra Shekhar Rao v/s. Dean, Seth G.S. Medical College reported in (1990) 3 SCC 130 and Ashok Kumar Gupta v/s. State of U.P. reported in (1997) 5 SCC 201, it has been held that reservation at the time of admission to the specialities/superspecialities courses would hardly lead to loss of proficiency or higher excellence. A doctor or a technologist has to pass the postgraduation or graduation with the same standard as had, by a general candidate and has also to possess the same degree of standard. The only limited concession given to reserved candidates is that he gets admission with comparatively lesser marks. This does not affect the proficiency. It has also been held that reservation in postgraduation courses is constitutionally permissible under Article 15(4). In my opinion, the questions raised by Mr. Tanna clearly stand answered by the Apex Court in P.G.I. of Medical Education & Research's case (supra).

It should be noted here itself that requisite scientific data is clearly available with the Government now having both the Baxi Panch Report and Mandal Commission Report, reference to which has been made by both the learned G.P. and the lelarned senior counsel. For a ready reference it might be noted that in so far as State of Gujarat is concerned there is enumeration of around 61 depressed backward classes in Mandal Commission Report.

It is, therefore, clear that the submissions made by Mr. Bhaskar Tanna, learned counsel for the petitioners with regard to reservation to the extent of 27% for SEBC raising the reservation from 10% by 17%, cannot be accepted.

III

NOMADIC TRIBES AND DENOTIFIED TRIBES (NT&DNT)

It has been submitted that there is no statutory classification of reservation as NT&DNT and they must neither be equated with the scheduled tribes nor with SEBC. This argument deserves to be rejected at the threshold. It might be noted that way back in 1963 the Government of Gujarat issued resolution No. D.M.T.'N.T.W./2062/C/505/G. dated 30th March, 1963. As a result of bifurcation of the States it became necessary for classifying certain tribes. Reference in this connection has been made in the resolution to the denotified tribes and Nomadic tribes. Social Welfare Department through its designated authority prepared a list and upon the report of such authority classification of NT&DNT came to be made as per the schedules A and B annexed with the resolution. By resolution dated 16/6/1995 a further clarification was made that the Nomadic tribes and denotified tribes in the State of Gujarat were 40 in number, but 2 of them were included in scheduled caste, 5 of them were included in scheduled tribes and 31 of them were included in SEBC and only 2 of the NT &DNT were left out. It has been recited that accordingly there are 38 castes and tribes which get double benefits under the reservation scheme. Therefore, it was resolved that the remaining two tribes, namely Garudi and Jogi were to be included in scheduled tribes and rest of the tribes/castes were to be included in their respective classifications of scheduled castes, scheduled tribes and SEBC as stated in the resolution. It therefore, clearly appears that there is not much of extra addition as such in the reserved classes, but the classifications have been crystalised. This resolution dated 16/6/1995 has accordingly worked since 1995. By resolution dated 14/7/1995 the Government further clarified that in the quota of scheduled tribes admissions were to be given to the candidates belonging to schedule tribes in the first instance and the seats still remaining vacant would be allotted to NT & DNT tribes out of the aforesaid 38 classified NT & DNT. By resolution dated 19/3/1996 the last mentioned resolution was extended for the academic year 1996-97. By resolution dated 30/5/1997 the said resolution was extended for the academic year 1996-97. By resolution dated 29/5/1998 it was extended to the academic year 1997-98 and by the present resolution dated 3/6/1998 the same has been extended for the year 1998-99, adding to the 38 NT & DNT the Jogi tribe making it 39 NT & DNT.

Mr. A.H. Mehta, learned counsel appearing for this class of students has referred to entry no. 15 in list 3 (current list) in schedule-7 to the Constitution

of India. He has also referred to Article 15 of the Constitution of India and paras. 55 and 56 of the Indra Sawhney's case (supra). He has submitted that bearing in mind the backwardness of the tribes classified as NT & DNT it was within the executive power to make provision for these tribes in the reservation. Apart from what has been submitted by Mr. Mehta, as stated above, the State policy dealing with the reservation of NT & DNT is quite rational and within the authority of the State by virtue of the provisions quoted by Mr. Arun Mehta, learned counsel. It is in this context that interpretation of rule 2.5 has also been pressed into service. However, it is clear that rule 2 has to be read with the aforesaid Government resolutions and has also to be construed harmoniously with the State policy as reflected in the aforesaid Government resolutions. In the result, the submissions made on behalf of the petitioners and concerning the reservation regarding NT & DNT provided by the State Government cannot be accepted.

INTERPRETATION OF RULE 2.5

It has been submitted that rule 2.5 of the admission rules should be construed so as to make available the reserved seats actually not filled in by respective categories to the general category. For the purpose of understanding the submission rule 2.5 might be reproduced :-

> "2.5. In case it is found in any particular year that the number of students belonging to respective communities and or categories mentioned above are not available for the reserved seats for such communities/categories the vacant seats from that reservation shall be treated as unreserved seats and filled up from amongst the students from the open merit list for the purposes of these admissions provided that if the reserved seats are distributed on pro-rata basis between Gujarat Board and Central Board/Council and if sufficient number of students are not available for the reserved seats distributed to the Central Board/Council such vacant seats shall be filled up by the available candidate from amongst the students on merit list prepared for the Gujarat Board category wise and vice versa."

Illustrating the argument Mr. Dave, learned advocate appearing for the petitioners submitted that if the seats reserved for scheduled tribes are not filled in from the students belonging to the schedule tribes, such balance

of unfilled in seats must go to the general category. In the same manner, if there are unfilled in seats from the scheduled castes students, they also must go to the general category of students and if there are unfilled in seats from SEBC, the same also must go to unreserved general category students. Reference has in this connection been made to rule 2 which would read as under:-

"2. Seven percent, forteen percent and twenty seven percent of the total seats shall be reserved for the candidates belonging to SC, ST (including Garudi) and S.E.B.C. respectively, provided that (i) Widows and (ii) orphan children shall be in the 27% reserved seats for S.E.B.C., (excluding creamy layer candidates as per G.R. S.W. Deptt. No. SCY-1194-Conf.-109-A, dt. 1/11/95) subject to the clarification that the reservation as applicable to Pramukh Swami Medical College shall be computed with reference to the total number of seats available in the college although there shall be no reservation in the "NRI seats" prescribed hereunder in rule 3. This reservation shall be for the candidates belonging to SC/ST (including Garudi) /SEBC recognised as such in the State of Gujarat and not to those who have migrated from other states.

Provided that 48% reserved seats as mentioned above shall be calculated out of the 85% left over seats after deducting 15% seats for the candidates coming from All India Entrance Examination provided in Rule 2.7 as per the judgment of Hon. High Court of Gujarat dated 5/10/1996 in Special Civil Application Nos. 5156, 5453 & 5555 of 1996. Please see note below Rule No.6 on Page No.3."

Mr. Dave also referred to rule 2 as it appeared in 1995-96 Rules. The same might also be quoted for a clear understanding of the submissions made by Mr. Dave :

"2. Seven percent of the total seats earmarked for admission to the first M.B.B.S./First B.D.S./First B. Physio courses respectively shall be reserved for candidates belonging to scheduled castes and fourteen percent of the total seats shall be similarly reserved for candidates belonging to scheduled tribes, Nomadic

Tribes and Denotified Tribes and twenty seven percent of total seats in Medical/Dental college and in physiotherapy course shall be reserved for the candidates belonging to the socially and educationally backward classes provided that (i) widows and (ii) orphan children shall be in this 27% reserved for S.E.B.C., subject to the clarification that the reservation as applicable to Pramukhswami Medical College shall be computed with reference to the total number of seats available in the college although there shall be no reservation in the "payment seats" described hereunder in rule 3. Under state quota as referred above, these seats are reserved for the candidates belonging to SC/ST/NT/DNT and SEBC recognized as such in the State of Gujarat and not to those who have migrated from other States."

In reply, it has been submitted that the seats which are not filled in in the quota of scheduled tribes, scheduled castes and SEBC must first go to the students who are left out in such reserved classes if at all such students are available and then only the balance seats would go to general class or category of students. In my opinion, the usage of the words "are not available for the reserved seats for such community/category" clearly and unambiguously convey that the reserved seats for scheduled castes, scheduled tribes and SEBC have to be exhosted from amongst the reserved classes in the first instance and then only they would go to the unreserved categories of students.

CERTIFICATE WITH REGARD TO CREAMY LAYER

Mr. Bhaskar Tanna, learned counsel for the petitioners made grievance regarding the Government policy as reflected by the respective resolutions of not insisting for the certificate of creamy layer as provided by the Apex Court in Indra Sawhney's case (supra). Reference in this connection has been made to head-note (P) in Indra Sawhney's case (supra). The head-note reads as under :-

"The very concept of a class denote a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Art. 16, if the connecting link is the social backwardness, it

should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone would the class be a compact class. In fact, such exclusion benefits the truly backward. The Supreme Court therefore directed the Govt. of India to specify the basis of exclusion - Whether on basis of income, extent of holding or otherwise - Of Creamy layer."

The head-note refers to paras. 86, 121 (3)(d), 450 and 451 of the citation.

In reply Mr. P.G. Desai, Ld. Govt. Pleader made a statement that the requirement of providing certificate regarding creamy layer is dispensed with only with regard to scheduled tribes and scheduled castes and the tribes akin to scheduled castes and scheduled tribes and for remaining SEBC, such requirement is not dispensed with and will not be dispensed with. In my opinion, bearing in mind such a statement of the Ld. Govt. Pleader and bearing in mind the fact that the requirement regarding certificate of creamy layer is quite within the compass of the State policy as ruled in Indra Sawhney's case, I do not find any reason to interfere with the relevant resolution dispensing with the requirement of certificate regarding creamy layer.

THE EFFECT OF RESERVATION FOR NRIs IN P.S. MEDICAL COLLEGE :

It is not in dispute that there is a reservation for NRI students in Pramukh Swami Medical College. It has been submitted that there is an error on the part of the Government in computing total seats which would fall to the reserved categories at P.S. Medical College, Karamsad. As per the provisions of rule 2 of the aforesaid admission rules, reservation is to be implemented without excluding total number of seats reserved for Non-Resident Indian quota (NRI quota). This would mean that there are inall 100 sanctioned seats for P.S. Medical College, Karamsad and out of such seats 12 seats would go to NRIs. Now as per rule 2 the reserved seats would be computed on the basis of 100 seats and not on the basis of 100 - 12 = 88 seats. It has been

submitted that this is not permissible in asmuch as it would have the effect of discriminating the students belonging to open category. A comparative illustration has been given with regard to 15% reservation for All India Students claiming admission on the basis of their performance at All India Entrance Examination. As per the relevant rule applicable at the relevant point of time reservation to the extent of 48%, as set out in rule 2 was prescribed to be computed from the total number of seats without excluding 15% seats reserved for All India quota. That was challenged before this Court in Special Civil Application No. 5156 of 1996 in the mater of Shajul George v/s. State of Gujarat and ors. The Division Bench of this Court (Coram : G.D. Kamat, C.J. as His Lordship then was and C.K. Thakkar, J.) by judgment and order dated 5/10/1996 ruled that there cannot be computation of reservation without excluding 15% seats earmarked for All India quota in as much as the reservation is required to be computed on the total seats available to the said quota. It has been submitted that the said analogy would apply to the exclusion of seats to NRI quota for the purpose of computation of seats available to reserved quota and unreserved quota. The Bench observed at page 14 of the decision as under :-

"It was submitted on behalf of the petitioners that after the decision of the Hon'ble Supreme Court in Unni Krishnan, in the matter of admission to students in professional colleges, merit and merit alone must be considered to be the sole criterion. It is also submitted that in the light of the Supreme Court decisions, the legal position regarding reservation is well-settled. At the initial stage, 15% seats of the total seats at all medical colleges should be reserved and earmarked for All India Entrance Examination. From the remaining seats, reservation can be made by State Governments in accordance with the provisions of Art. 15 of the Constitution. It was submitted that in the light of a larger Bench decision in Indra Sawhney vs. Union of India and others, AIR 1993 SC 477, such reservation is permissible upto 50%. It is, however, not open to the respondents to give efect to the reservation policy on the basis of total number of seats. It is clearly violative of the mandate given by the Hon'ble Supreme Court in Dinesh Kumar as well as in Unni Krishnan. To that extent, the action of the respondents requires to be interfered with by this Court."

At page 16 the Court concluded as under :-

"In our opinion, the interpretation put forward by the respondents is not correct. The law, according to us, is well settled that initially 15% from the total seats are to be reserved at the First MBBS course for All India Entrance Examination. Thereafter, 100% seats are not available to the State and there is no scope of granting or extending benefit to reserved classes from 100% or from the total seats. Such reservation under Article 15 of the Constitution can be made only on the basis of available seats (85%). According to us, the submission of the petitioners is well founded that 15% seats for All India Entrance Examination has been earmarked as per the decision of the Supreme Court and it is beyond the power of Central Government or State Government to make encroachment therein. Thereafter only 85% seats remain and hence reservation can be made from that quota. In the instant case as the State Government attempted to reserve 48% seats for S/C, S/T and SEBC from 100%, the action is inconsistent with the decisions of the Supreme Court and is hereby declared as contrary to law."

This court, therefore, concluded that 15% of the total seats earmarked for All India Entrance Examination have to be excluded for the purpose of computation of percentage as amongst reserved class and unreserved class. From the remaining 85% seats reservations can be made for scheduled castes, scheduled tribe and other backward class as provided in Article 15 of the Constitution subject to the maximum of 50%. To the extent that rule 2 provided for reservation from the total seats (100%) it was declared ultravires and unconstitutional.

It was submitted that the aforesaid decision was taken to the Hon'ble Supreme Court, but such a challenge has failed at the very initial stage.

The submission, therefore, is that on the principle set out by the Division Bench in Shajul George's case (supra) there should also be the exclusion of 12 seats in P.S. Medical College for the purpose of computation of reserved seats and unreserved seats.

In reply, Mr. Haroobhai Mehta, learned senior

counsel submitted that the principle of computation as set out by the Division Bench in the case of Shajul George's case (supra) will not be applicable to the 12 seats of NRI for the purpose of computation in P.S. Medical College. In my opinion, the principle of computation as has been set out by the Division Bench in Shajul George's case (supra) shall also apply to the computation of seats in P.S. Medical College and in respect of such computation there shall be reduction of 12 seats for NRI in the first instance and then there will be division according to the percentage of reservation from the remaining seats.

CREATION OF SUPERNUMERARY SEATS :

From the submissions it would clearly appear that the reservation is not dependent upon the creation of supernumerary seats. However, the idea behind making of a mention regarding creation of supernumerary seats in the relevant resolution/s is to see that by making efforts for creation of supernumerary seats, the seats that might be available to the unreserved class might stand increased in case permission to create supernumerary seats is accorded by the All India Council for Technical Education and by the Medical Council operating under the relevant statutes. The Government of Gujarat, through the Ld. Govt. Pleader has stated that sincere efforts will be made by the concerned authorities of the Government of Gujarat for seeing that supernumerary seats are permitted by the respective Councils. However, in so far as the current year is concerned, nothing further can be said.

: CONCLUSIONS :

In the result, I find as under :-

I. Rule 6 coupled with the note as per the interim arrangement ordered by the Division Bench as noted hereinabove will operate for the current year and the deletion of rule 6 alongwith the note by Government Resolution dated 10/7/1998 shall operate from the next academic year.

II. Challenge to 27% reservation for SEBC must fail.

III. Challenge to the State policy in respect of

Nomadic Tribes and Denotified Tribes must fail.

IV. The requirement of creamy layer certificate will continue as per the State policy and as per the statement made by the Ld. Govt. Pleader.

V. The computation of reservation of the seats for NRI quota in P.S. Medical College would be in terms of the decision of the Division Bench in the case of Shajul George's case (supra) rendered on 5/10/1996 in Special Civil Application No. 5156 of 1996.

VI. With regard to prescription of minimum qualifying marks for admission to the Medical, Pharmacy,

Physiotherapy and Engineering courses, the Government will consider the decision of the learned Single Judge as well as the decision of the Division Bench in Shajul George's case (supra). However, so far as current year is concerned, there is no need to interfere with the State policy in this respect.

Rule is partly made absolute in the aforesaid terms with no order as to cost.

* * * * *

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